No. 4113

United States

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of WALTER V. EMPIE, Doing Business as WILLIS ALLEN MOTOR COMPANY, Bankrupt.

H. W. SWENDER,

Appellant,

vs.

WALTER V. EMPIE,

Appellee.

Appellant's Petition for Re-Hearing

Upon Appeal From the United States District Court for the Southern District of California Southern Division

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TO THE HONORABLE, THE JUSTICES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

The closing admonition in one of the beautiful lectures of a certain fraternal order is this—"And despair not of the final triumph of truth."

The Objecting Creditor and his counsel have taken this admonition to heart, and we shall not despair of the final triumph of truth. It has been admitted on all sides that the testimony given by the bankrupt in this case is untrue. There is no controversy on that point.

The evidence does not admit of any controversy on that point. But thus far the bankrupt has been able to evade the consequences of his untruthful testimony because as the Referee put it "he was not convinced that the bankrupt remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor." In other words the bankrupt has avoided the consequences of his untruthful testimony by means of the old worn-out excuse "I don't remember."

Neither this Court, nor the Referee who heard the evidence, nor can anyone else prove with geometric certainty that the bankrupt testified untruthfully intentionally or unintentionally. Absolute demonstration of the bankrupt's intent in giving the untruthful testimony is out of the question. But in determining what *was* the intent of the bankrupt in testifying untruthfully, this case like all other cases must be measured not by a variable standard which might be varied in each case to suit the notion of the trier of fact, but instead it must be measured by the fixed standard of what the ordinary man in the circumstances would have remembered.

And this Honorable Court is undoubtedly more competent to pass upon that question than any single judge. In the absence of any proof that the bankrupt was a grossly ignorant man or was to some degree a mentally incompetent person, his acts and conducts must be measured and judged by a fixed standard—namely, that of what the ordinary man in like circumstances would have remembered.

The Referee in the case at bar applied a different standard, namely, his own individual judgment as to whether the bankrupt has testified untruthfully. This individual judgment was based according to the Referee's own admission, upon the impression made upon the Referee by the bankrupt's demeanor upon the stand and because the witness appeared frank and candid and seemed to be a willing witness and because he created a favorable impression on the Referee. Just how it could be possible for the witness to create a favorable impression upon the Referee when in the Referee's own words the bankrupt "seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transaction's relation to the musical instruments," will always remain a mystery; but be that as it may, it appears without any doubt from the Referee's report that he recommended the discharge of the bankrupt notwithstanding the untruthful testimony the bankrupt had given because in this particular instance the frank, candid, willing appearance of the bankrupt led the Referee to believe that the untruthful testimony had not been given intentionally. Now, if the Referee could lawfully draw his own deductions in each particular case as to whether the bankrupt had testified untruthfully intentionally or unintentionally, there could never be any uniformity in the administration of the Bankruptcy Act, and furthermore such a rule would tend to open the door to an abuse of discretion from which an appeal would lie in name only. Therefore we say that for the sake of uniformity in the ad-

ministration of the Bankruptcy Act, that where a bankrupt has testified untruthfully, the question of whether he did so intentionally or unintentionally is not a matter of fact to be determined in each particular case, according to the impression made upon the trial judge, but instead is a matter of law which must and will be determined by applying the standard of what the ordinary man in like circumstances would have remembered.

But this is an entirely different situation than that presented where the trier of fact is the judge of the credibility of the witness in the first instance. This is a situation where it is an established and recognized fact that the witness did not tell the truth and the question presented is: Did the witness tell what was not true intentionally or unintentionally. It is in such a situation that the rule applies that the trial judge is not at liberty to decide the question as a question of fact according to his personal and individual impressions of the witness which he used in the first instance before the bankrupt's testimony had been proved untruthful, but that on the other hand he must judge the explanation offered by the bankrupt for the false testimony, to-wit, forgetfulness, by determining what the ordinary man in like circumstances would have remembered. It is no longer a question of credibility of the witness; it is now a question of mixed fact and law as to what the ordinary man would have remembered in like circumstances.

When this correct rule is applied to the findings which the Referee has himself made in this case,

it will be seen at a glance that the Referee erred in recommending the bankrupt's discharge, for the Referee says in his own words that "judged by the usual experience in human affairs and in the course of ordinary memory, it would seem that Empie should have remembered more promptly and more clearly the circumstances relating to his disposition of the piano and phonograph—it would seem that ordinarily he should have given the full facts on the first, as well as on the last occasion of his testimony in respect thereto." Having made these findings, it was clearly error on the part of the Referee to recommend the discharge. The situation is analogous to that where a judgment is inconsistent with and is unsupported by the findings. Furthermore this Honorable Court is fully as competent, to judge as was the Referee as to whether the ordinary man in like circumstances would have remembered that he had not sold his one and only grand piano and his one and only Victrola to some *unknown stranger* for *cash* when at the very moment of so testifying he had the proceeds of the sale in his pocket in the form of due-bills payable in merchandise only, which due-bills had been given to him in payment for his piano and Victrola not by a stranger but by the Southern California Music Company of Los Angeles, the very same company from which the bankrupt had purchased the piano and Victrola a few months before. We say that this Court is as competent as the Referee to judge as to whether the ordinary man in like circumstances who gave such testimony gave it intentionally or unintention-

ally. The law permits but one conclusion to be drawn from the giving of untruthful testimony where it is given under such circumstances that the person giving it could not help but know and should be held to know that it was false; and that conclusion is that it was untruthful through intention.

The bankrupt testified before the Referee at the first meeting of creditors that in the fall of 1919 he had purchased from the Southern California Music Company, of Los Angeles, a grand piano for $850.00 and a Victrola for about $300.00, and that in June of 1921 he had sold his grand piano and Victrola for cash and mingled the proceeds with his general funds and spent them, and that the purchaser was a stranger to him, whose name and address he did not know, and that the purchaser came to the bankrupt's house with a truck, and that he did not know how he happened to find the purchaser, but that he had advertised the piano and Victrola for sale at the time, but that he did not remember whether the purchaser came in answer to the advertisement or not, and that he (the bankrupt) had only a hazy recollection of the transaction and that he had not thought of the thing in years.

Here was indeed a tantalizing situation. The creditors felt and knew intuitively that the bankrupt was not telling the truth, but they had no way of proving it. There was hardly a clue for the creditors to start from in solving the question of what had become of the piano and Victrola. But in the first place, the creditors knew that it had not been "years" since the bankrupt had thought about his

piano and Victrola, for the evidence showed that the bankrupt had the piano and Victrola in his home up to and including the 1st day of June, 1921. And the first meeting of creditors was on July 6, 1922. So that much was certain—it had not been *years* since the bankrupt had thought of the sale of his piano and Victrola. It had only been one year, one month, and six days since his one and only grand piano and his one and only Victrola had been sold. An examination of the records of the two banks with which the bankrupt had testified he was doing business, to-wit, the Security Trust & Savings Bank and the Hellman Commercial Trust & Savings Bank, quickly established the fact that there were no deposits in the bankrupt's account in either bank which in any way approximated the amount which the bankrupt testified that he received for his grand piano and Victrola. The bankrupt's testimony on the question of the amount he had received for his piano and Victrola should have given his creditors a clue, but it did not. The bankrupt was asked: "Did you sell it (the piano) for cash?" The answer was: "I—yes." The next question was "How much?" The answer was: "Well, there was—just turned over the amount of money, $850.00." When asked what he had received for the Victrola, he said: "About $300.00."

This seemingly was the end of the trail. It was a most discouraging outlook for the creditors. While the bankrupt's protestations of forgetfulness of the transaction were unbelievable, nevertheless, the creditors had no proof to show that the story was false.

But we did not despair of the final triumph of truth. We set to work to find out what became of that grand piano and Victrola. It took four months of painstaking, heartbreaking, and expensive detective work to find out something that the bankrupt should have frankly told his creditors in four seconds, and that was this: The bankrupt had sold his grand piano and Victrola to the Southern California Music Company—the very same company from which he had bought them! And the payment he had received for his piano and Victrola instead of being cash which he had deposited with his general funds and spent, as he had testified, was received in the form of two due bills! These due-bills were payable only in merchandise. One of the due-bills was for $850.00, and was in payment for the piano. The other due-bill was for $312.50 and was in payment for the Victrola.

But an even more astounding revelation was the fact that the bankrupt at the very instant of testifying before the Referee at the first meeting of creditors when he had testified that he had sold his grand piano and Victrola for cash to some stranger whose name and address he did not know, and had mingled the proceeds with his regular business funds, and that he did not know whether the stranger who purchased the piano and Victrola came in answer to his advertisements or not and that he had only a hazy recollection of the transaction and that he had not thought of the thing in years—an even more astounding revelation we say was the fact that at the very instant of so testifying the bankrupt had in his

possession the two due-bills which he had received from the Southern California Music Company in payment for his piano and Victrola; and six weeks after giving this perjurous testimony the bankrupt sold one of the due-bills to a chance acquaintance whom he happened to meet in the street car on the way to his home.

How in the name of common sense could any sensible human being believe that the bankrupt actually forgot that he had not received cash for his piano and phonograph, when at the very instant of so testifying he had the proceeds of the sale in his possession in the form of due-bills, which were payable only in merchandise.

What a base slander upon the human faculty of memory to say that Empie was not deliberately falsifying when he testified that he did not remember the transaction very well and that he had only a hazy recollection of the transaction and that he had not thought of the thing in years—when right at that very moment of uttering that false testimony the bankrupt had in his possession the proceeds of the sale in the form of due-bills payable in merchandise.

What a reflection it is upon human intelligence to say that it was possible for Empie to have honest and truthful intentions in testifying that he had sold to some stranger for cash, which cash he had mingled with his general funds and spent, when at the very instant of uttering the words he knew that the "stranger" was the Southern California Music Company—the very same company from whom he had purchased the piano and Victrola; when he knew

that he had not sold for cash and deposited the money with his general funds for the simple reason that at that very instant he had the proceeds of the sale in his possession in the form of due-bills payable in merchandise.

No doubt this Honorable Court wonders why black has thus been called white. We cannot explain without going outside of the record, and we will not do that without being invited to do so by the Court, notwithstanding the fact that an injustice was done the Objecting Creditor which will be irreparable should the bankrupt's discharge be granted. But black has been called white just the same; and the question now before this Honorable Court is: Will the finding of the Referee that the bankrupt did not remember the truth stand in the face of the overwhelming presumption of the human impossibility of such complete forgetfulness by the bankrupt of vital, outstanding, present facts. It is an abuse of discretion on the part of the Referee to say that Empie could possibly have forgotten the truth concerning those things of which he testified falsely; such a holding by the Referee is flying directly in the face of human experience with the ability of man to recall the past and recognize the present. If a Referee can excuse such palpably intentional false testimony on the ground of forgetfulness, then hereafter a finding of "false oath" will be entirely dependent upon the notion of the trier of fact as to the credit that should be given to the excuse offered by the bankrupt and will no longer be measured and be determined by the law.

We say that in such a case as this one, where the bankrupt has testified untruthfully about vital, important, and outstanding facts then within his knowledge, and concerning which forgetfulness is incredible and humanly impossible,—that in such a case it is no longer a question of fact as to whether the bankrupt testified truthfully intentionally or not, and it is no longer a question which the Referee in the case at bar was at liberty to resolve either way, according to his impressions, but instead it is solely and purely a question of law from which, in this case at least, but the one conclusion can be drawn, namely, that the bankrupt testified falsely intentionally.

The Bankruptcy Act has provided a penalty for the offense of False Oath,—the denial of the discharge. The Act is not to be set at naught by a finding that the false oath was uttered through forgetfulness when it is contrary to all human experience to believe that forgetfulness is humanly possible concerning the present vital facts of which the evidence shows the bankrupt to have been admittedly possessed.

We shall not despair of the final triumph of truth. For the sake of uniformity in the administration of the Bankruptcy Act we ask that a "false oath" be dealt with as a "false oath," and not be granted absolution in the name of forgetfulness. Black is not white!

We can see in the opinion recently rendered by this Honorable Court in this case unmistakable evidence of the grave doubts that were personally en-

tertained by its members as to the bankrupt's sincerity in his testimony. These personal misgivings, however, we believe were suppressed out of deference to the trier of fact. We have endeavored to point out that where a bankrupt testified untruthfully the question of whether he did so intentionally or unintentionally is not a matter of fact to be determined in each particular case according to the personal and individual impressions of the trial judge; but that on the other hand the true rule is that where a bankrupt testified untruthfully he will be deemed by law to have done so intentionally if the ordinary man in like circumstances would have remembered the truth. Any other rule, and particularly the rule applied by the trier of fact in the case at bar, would be productive of anything but uniformity in the administration of the Act.

We therefore invite the attention of the Court to this point, which has not heretofore been squarely presented, and we earnestly request a rehearing.

Respectfully submitted,

ALLEN, ALLEN & EAGAN,

Attorneys for the Appellant.